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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

PETER FRANKL AND
JOHN DECKARD,

Plaintiffs,

v.

NETOPIA, INC. AND ALAN LEFKOF,

Defendants.

Case No. 3:078-MC-80195(MHP)

(PENDING IN THE U.S. DISTRICT
COURT FOR THE NORTHERN
DISTRICT OF TEXAS 3:05-CV-1757B)
(*PRO HAC VICE*)

OPPOSITION TO NETOPIA'S MOTION
TO QUASH OR MODIFY JONATHAN
GUTHART'S SUBPOENA DUCES
TECUM

Assigned to Magistrate Judge Edward Chen
Date: October 3, 2007
Time: 1:00 p.m.

TO: THE COURT, ALL PARTIES AND THEIR COUNSEL OF RECORD:

Plaintiffs incorporate the Opposition papers they have filed today concerning the Morrison & Foerster subpoena. Exhibit K to the Declaration of Wade McClure filed in support of their opposition contains portions of deposition testimony of at least two representatives of KPMG including Mr. Guthart. This disclosure of testimony to the SEC, without objection, waives any privileges that either Netopia or KPMG might have enjoyed with respect to the subject matter of those depositions. Plaintiffs would also advise the Court that a similar Motion has been filed in the underlying case, Civil Action No. 3:05-CV-1757-AH ECF, *Peter Frankl and John Deckard v. Netopia, Inc. and Alan Lefkof*. See Netopia's Motion for Protection or, Alternatively, Motion for Leave to File Motion for Partial Summary Judgment, attached as Exhibit A. This Motion included, among other things, a request by Netopia for protective order concerning the subpoenas served on Mr. Guthart. See Exhibit M to that Motion, which is attached hereto as Exhibit B. Magistrate Judge Sanderson heard arguments on this Motion on September 11, 2007 and denied Plaintiffs' Motion for Protection from the bench. Magistrate Sanderson has not issued a written order at present.

For these reasons the Plaintiffs assert that Defendant's Motion to Quash the Guthart subpoena should be denied in all respects.

Dated: September 12, 2007

GIBSON, MCCLURE, WALLACE & DANIELS, LLP

By: s/ Wade L. McClure
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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on September 12, 2007, a true and correct copy of this instrument was filed electronically, notice of the filing was served on counsel for the Defendants by operation of the Court's electronic filing system, and the parties may access this filing by and through the Court's electronic filing system.

s/ Wade L. McClure

Wade L. McClure

DECLARATION OF WADE L. MCCLURE

I, Wade L. McClure, hereby declare as follows:

1. I am an attorney at law admitted *pro hac vice* to practice in the Northern District of California and a partner in the law firm of Gibson, McClure, Wallace & Daniels, LLP, attorneys for Plaintiffs Peter Frankl and John Deckard. I have personal knowledge of the facts stated herein, and if called and sworn as a witness, I would and could testify competently under oath thereto. I submit this declaration in support of the Opposition to Netopia's Motion to Quash or Modify Jonathan Guthart's Subpoena Duces Tecum.

2. Attached hereto as **Exhibit A** is a true and correct copy of Defendants' Motion for Protective Or, Alternatively, Motion for Leave to File Motion for Partial Summary Judgment, filed by Netopia in the underlying case, Civil Action No. 3:05-CV-1757-AH ECF, *Peter Frankl and John Deckard v. Netopia, Inc. and Alan Lefkof*.

3. Attached hereto as **Exhibit B** is a true and correct copy of Exhibit M filed in support of that Motion for Protective Order. Exhibit M contains copies of the same subpoenas served upon Mr. Guthart which are the subject of this Motion.

I declare under penalty of perjury under the laws of the United States of America that the foregoing declaration consisting of nine numbered paragraphs is true and correct, and is based upon personal knowledge.

Executed this 12th day of September, 2007, at Dallas, Texas.

s/ Wade L. McClure

Wade L. McClure